Reflections in Three Mirrors: Complexities of Representation in a Constitutional Democracy

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In his Frank Strong Lecture, Professor Peter Shane responds to commentators who have embraced a particularly strong view of the unitary presidency that would legitimate virtually unlimited executive discretion in the conduct of foreign policy and public administration. Professor Shane argues instead for a robust version of checks and balances in which Congress enjoys a substantial role in shaping the exercise of executive power and the judiciary conscientiously constrains both of the elected branches to adhere to constitutional principles. He contends that only a vigorous system of checks and balances can implement the philosophy of representation embedded in the Constitution.

According to Professor Shane, the Constitution embodies the view that effective representation can be accomplished only through an amalgam of different political institutions, with different constituencies, authorities, capacities, and decisional processes. He identifies a variety of possible meanings for "representation" and traces the evolution of ideas about representation in the seventeenth and eighteenth centuries. He argues that the framers designed a system of three branches, each of which they regarded as equally "representative." Unless public policy reflects substantial interaction among the branches, it is unlikely to reflect the quality of deliberation that the framers intended their new representative government to exhibit.

I. INTRODUCTION: REPRESENTATION AND CHECKS AND BALANCES

It is a very great honor to have been invited by Ohio State to be part of a Law Forum named for Frank R. Strong. Dean Strong's record as both scholar and educational leader is a distinguished one, and the burden of living up to the standards embodied in his work is daunting. He once wrote of constitutionalists who engage in a "disregard for [the] historic meaning" of the Constitution to the point of what he called "the opposite extreme of indulgence in spurious noninterpretivism."[1] I hope what I say here will not fall prey to that indictment. Indeed, I hope I can help succeed in reawakening us to a fundamental aspect of the

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I am deeply grateful to Dean Gregory Howard Williams and to the faculty of The Ohio State University College of Law for the invitation to deliver this address as the 1998 Frank R. Strong Law Forum Lecture.

[1] FRANK R. STRONG, SUBSTANTIVE DUE PROCESS OF LAW: A DICHOTOMY OF SENSE AND NONSENSE, at vii (1986).

historic Constitution—its approach to the problem of representation—although I confess at the outset that the conceptualization of representation I proffer here takes on at least a vocabulary different from that of the founding generation.

The focus of most of my own scholarship in recent years has been the law and practice of separation of powers at the national level. Through a number of articles, I have tried to champion a fairly robust view of constitutional checks and balances. I have argued, with regard to law enforcement,[2] presidential regulatory policymaking,[3] and policymaking in war time[4] that our government is best served by implementing a constitutional vision that embraces interbranch dialogue, mutual accountability, and extended deliberation. I have argued that a government committed to such principles is most likely to produce decisions that are sound, lawful, coherent, effective, and widely accepted as legitimate.

In significant part, this body of work has been framed as a response to another current school of thought that is antagonistic to checks and balances. I call this competing school of thought "presidentialism," because it embraces a particularly strong view of the so-called "unitary Presidency" as a way of promoting efficiency, coherence, and accountability in policymaking. Led, in the judiciary, by Justice Antonin Scalia,[5] and, among academics, chiefly by Professor Steven Calabresi[6] of Northwestern University, the presidentialists read into the Constitution not merely the possibility, but also the legal command (or set of legal commands) that Presidents enjoy virtually unlimited discretion in the conduct of both foreign policy and public administration on the domestic front. In their hands, our Constitution of 1787 becomes very nearly the Constitution of the Fifth French Republic[7] (although Professor Calabresi, to his credit, does oppose recognition of an inherent presidential decree power).[8]

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[2] *See* Peter M. Shane, *Presidents, Pardons, and Prosecutors: Legal Accountability and the Separation of Powers*, 11 YALE L. & POL'Y REV. 361 (1993).

[3] *See* Peter M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 ARK. L. REV. 161 (1995).

[4] *See* Peter M. Shane, *Learning McNamara's* Lessons*: How the War Powers Resolution Advances the Rule of Law*, 47 CASE W. RES. L. REV. 1281 (1997).

[5] *See* Morrison v. Olson, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

[6] *See* Steven G. Calabresi, *Some Normative Arguments For The Unitary Executive*, 48 ARK. L. REV. 23 (1995) [hereinafter Calabresi, *Normative Arguments*]; Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute The Laws*, 104 YALE L.J. 541 (1994); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992); Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During The First Half-century*, 47 CASE W. RES. L. REV. 1451 (1997).

[7] For a discussion of executive power under the French constitution, see JOHN BELL, FRENCH CONSTITUTIONAL LAW (1992).

[8] I think it is not normatively desirable to give presidents a decree lawmaking power to alter what Professor Monaghan calls the background distribution of private rights. As I explained

In lecturing about these issues, I have always been bedeviled by a particular handicap that dabblers in this field of law must endure—there is precious little "separation of powers" humor with which to lighten the subject matter. Almost five years ago, at a University of Michigan constitutional law conference, that problem was somewhat alleviated for me. Lying half-awake the night before a separation of powers panel on which I was scheduled to speak, I received a vision of a black-robed man, slick of hair and full of beard, reciting a venerable genre of poetry. He intoned:

> Said Scalia, "Since I've been a jurist,
> Of one thing I have always been surest.
> When the past is a mystery,
> I just make up the history.
> It keeps my originalism purest."

I hope this is not taken to be too cheap a shot at Justice Scalia, but I can tell you what inspired the poem. Without citation to any historical sources beyond *The Federalist* (which, in my view, he misreads), Justice Scalia insisted in *Morrison v. Olson*, the Supreme Court case upholding the independent counsel law, that a proper reading of the historical Constitution absolutely mandates his rigidly categorical approach to the interpretation of executive power.[9] As a matter of fact, he is wrong about the relevant history, as several distinguished writers have pointed out at length and in eloquent and persuasive detail.[10] Executive power did not mean to the Framers what it means to Justice Scalia. From an originalist perspective, our institutions of national government have substantial discretion under the Constitution to shape their degree of mutual engagement or independence. And they are not bound by a rigid constitutional categorization of executive power that precludes strong checks and balances on the Presidency.

But, even if the Presidentialists are engaging in "spurious interpretivism," to

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at various points above, there is too great a risk that popular presidents backed by national majorities will impose unfair burdens on individuals or on small and unpopular groups.

Calabresi, *Normative Arguments*, *supra* note 6, at 96.

[9] *See Morrison*, 487 U.S. at 698–99 (Scalia, J., dissenting). To be fair, I should note that Justice Scalia does cite M. Farrand's *Records of the Federal Convention of 1787* for the uncontroversial proposition that "[p]roposals to have multiple executives, or a council of advisers with separate authority were rejected" by the framers. *Id.* at 699.

[10] *See generally* GERHARD CASPER, SEPARATING POWER: ESSAYS ON THE FOUNDING PERIOD (1997); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725 (1996); William B. Gwyn, *The Indeterminacy of the Separation of Powers and the Federal Courts*, 57 GEO. WASH. L. REV. 474 (1989); William B. Gwyn, *The Indeterminacy of the Separation of Powers in the Age of the Framers*, 30 WM. & MARY L. REV. 263 (1989).

vary a bit from Dean Strong's phrasing, they may still have their way as a matter of political reality. That is because, if I am correct that the Constitution confers upon the three branches substantial legal discretion to shape their degree of mutual engagement or independence, the three branches could exercise that discretion in a manner that licenses a largely autonomous executive of the sort that Justice Scalia would champion. The fact that our legislative branch could hold the executive tightly to account does not require it to do so.[11] Our judiciary, through various doctrines of prudence and self-restraint, could substantially forbear from engaging in judicial review of the executive.[12] In short, Congress and the courts could be true to the letter of the Constitution, but false to its spirit.

That is why, if the spirit of checks and balances is to prevail in American government, it is not enough to interpret what the Constitution commands. It is imperative to outline a normative vision of how our government should work that, in turn, is powerful enough to inspire the three branches in exercising their discretion over the structure and operation of interbranch dialogue. It is important to go further than showing that a robust theory of checks and balances is an *available* idea; it must be shown to be a *good* idea, or we will not long have it.

My thesis is that an important normative case for embracing a strong version of checks and balances rests on the congruence between such a system and the philosophy of representation most obviously embedded in our Constitution. That philosophy, I believe, can be succinctly summarized as follows: Whatever representation *is*—or, perhaps more helpfully, whatever representation *does*—it can be implemented only through an amalgam of different kinds of political institutions. These institutions differ in their constituencies, their processes, their authorities, their capacities, and in their modes of organization and selection. But they are all co-equal in their claims to representativeness because of three different features. First, each is constituted by a process governed either by "the people" themselves or by those chosen by the electorate to assemble the institution in question. Second, each is bound to "We, the People" as a fiduciary for our interests. Third, each participates in a process of mutual constraint and legitimation among government institutions

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[11] *Cf.* Stephen W. Stathis, *Executive Cooperation: Presidential Recognition of the Investigative Authority of Congress and the Courts*, 3 J.L. & POL. 183 (1986) (documenting the willingness of the executive branch to share with Congress even information it might legally withhold under plausible claims of privilege).

[12] Among the judicially crafted "prudential" standing rules that the Court invokes in order to justify not hearing cases concededly within both its constitutional and statutory jurisdiction are rules against so-called third-party standing, *see* United States v. Raines, 362 U.S. 17 (1960), and requiring federal plaintiffs to show that the interests they seek to advance in litigation fall within the "zone of interests" arguably sought to be protected by the constitutional or statutory provisions whose coverage the plaintiffs seek to invoke. *See* Air Courier Conference of Am. v. Am. Postal Workers Union, 498 U.S. 517 (1991).

that is essential to what Hamilton called government from reflection and choice.[13]

This is not the only way of interpreting the Constitution's approach to representation, although I am hardly alone in identifying it.[14] We could dismiss the Constitution's eclecticism in institutional design as the mere artifact of compromise, not as the expression of an ideal. Some who ratified the Constitution were surely democrats who nonetheless felt compelled to accept the elitism of the Senate and Executive. Others were elitists constrained to allow the relative populism of the House. Some were states-rights advocates who nonetheless relented in a national government operating directly on the people. Others might better be seen as nationalists who resigned themselves to a large measure of federalism. What I propose, however, is that we do not view the tensions embodied in the Constitution as instances of greater or lesser fidelity to some purer, singular principle of political representation. Rather, I would view those tensions as affirming a positive understanding of political legitimacy—namely, that the wide variety of functions Americans want representative government to accomplish and the qualities Americans want that government to honor demand a complex network of competing, but interdependent sources of authority. In this sense, each of our three branches of government is importantly a *representative* branch of government, and it is important to our popular sense of government legitimacy that we understand how "We, the People" are represented in each branch. Hence, the "three mirrors" of my title.

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[13] *See* THE FEDERALIST NO. 1, at 33 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[14] Precisely because the Federalists considered "every branch of the constitution and government to be popular" and regarded the president, Senate, and even the judiciary as well as the House of Representatives as somehow all equal agents of the people's will, they could more easily than their opponents justify the separation and protection of each branch "by the strongest provisions, that until this day have occurred to mankind."

GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 549 (1969); *cf.* Cynthia R. Farina, *The Consent of The Governed: Against Simple Rules For a Complex World*, 72 CHI.-KENT L. REV. 987, 988–89 (1997). Farina states:

> No single institution or practice is capable of performing the multiple tasks of registering, interpreting, educating, adapting, affording participation, facilitating deliberation, brokering accommodation, and umpiring conflict that are (or at least ought to be) entailed in shaping the public policy of a post-industrialized democracy with an activist regulatory government. There are no simple rules for this complex world. Rather, we must necessarily look to a plurality of institutions and practices as contributors to an ongoing process of legitimizing the regulatory state.

Id.

II. THE AMBIGUITIES AND EVOLUTION OF "REPRESENTATION"

Representation is a notoriously elusive concept. The best approach to its understanding is a bit indirect. I shall start by highlighting at least four things that are frequently equated with the concept of "representation," but, rather than choose among them *a priori*, I would like to focus on the problems representation was intended to solve for the founding generation. Only then do I believe we can speak sensibly about what counts as political representation in the constitutional sense and about the implications of the constitutional conception of representation for separation of powers theory.[15]

When we speak of representation in everyday conversation—when we say that we are "represented" in court, or in the legislature, or in a faculty senate, for example—there are at least four distinct meanings that could easily be associated with our words. First, we could be saying there is someone in a decisionmaking or decision-influencing position whom we helped select. We chose the person who acts in our name. There is someone who is our representative because they legitimately have a decisionmaking role, and they legitimately have that role precisely because we participated in the process of giving them the authority they now possess. Our representative is, in this sense, our *delegate*.

Alternatively, we could say and often do say we are "represented" because there is someone in a decisionmaking or decision-influencing position who resembles us in some special aspect of our personal circumstances. Today, because of the intensification of identity politics, this concern—sometimes called "the politics of presence"—is much discussed.[16] But the features by which we today tend to measure our presence—perhaps most frequently, race and gender—by no means exhaust the elements of identity or interest that have shaped the politics of presence throughout American history. Divisions between farmer and merchant, between labor and capital, and between North, South, and West have all been as salient in their time as are the different dimensions of identity that preoccupy our politics today. Those who represent us, in this sense, are our *identity surrogates*.

Third, we sometimes say we are represented because someone in a decisionmaking or decision-influencing position is obligated, all things being equal, to articulate preferences regarding any particular decision that are identical to our preferences. If we would vote for something, they must vote for it. They must oppose what we oppose. In this light, our representative is our proxy. He or she contributes to decisionmaking just what we would contribute if we were physically present and authorized to participate ourselves. Our representatives in this sense are

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[15] A now-classic analysis of the multiple meanings of representation is HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION (1967). Although my taxonomy is expressed somewhat differently from Pitkin's, we are discussing similar phenomena.

[16] *See generally* ANNE PHILLIPS, THE POLITICS OF PRESENCE (1995).

our *spokespeople*. It is this theory of representation that was best captured in the eighteenth century practice of sending instructions to one's representatives.[17]

Finally, we say we are represented in a decisionmaking process if that process is required to take account of our interests. If our welfare cannot properly be disregarded in a decisionmaking process or if our interests cannot lawfully be intruded upon without some strong, public-regarding justification, then we are represented in yet a different sense from those mentioned above. Our representatives in this sense are our *fiduciaries*.

There are limited circumstances when it is almost possible to imagine that a single representative could be delegate, identity surrogate, spokesperson, and fiduciary all at once—when we vote for a victorious candidate who looks like us and who faithfully articulates our preferences which, as it happens, coincide with our best interests. But this rarely occurs so happily. To take extreme examples, African Americans may accept Clarence Thomas as their identity surrogate on the Supreme Court; he is typically not their spokesperson. The President may be a fiduciary for permanent resident aliens, but he is not their delegate, and so on. Although, in thinking about representation, many of us would regard each aspect I have highlighted as being of serious concern to us, the analytic distinctiveness of each aspect of representation and the reality that they can rarely all be optimized at once makes talking about representation seem often to verge on incoherence.

The changeability of the meaning of representation is of special concern in understanding our Constitution because, between the late seventeenth century until the end of the eighteenth century, there was a series of changes in British, and ultimately in the American, understanding of the relationship of people to government that was nothing short of revolutionary.[18] Although perhaps not voiced in this way, what made these changes revolutionary for the law of political representation was the transformation being worked in the notions of representation as delegated action, identity surrogacy, proxy advocacy, and fiduciary decisionmaking. What follows is the barest of outlines of these changes, bearing in mind that hindsight exhibits all of these developments with greater clarity than was perceived by those who lived through them.

The English, at mid-seventeenth century, held to a theory of mixed government, under which "the presence in the legislature of the three estates of monarchy, aristocracy, and people would prevent the constitution from degenerating into the

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[17] *See generally* JOHN PHILLIP REID, THE CONCEPT OF REPRESENTATION IN THE AGE OF THE AMERICAN REVOLUTION 96–109 (1989).

[18] Gordon Wood has provided the most influential historical account of this evolution. *See* WOOD, *supra* note 14, at 162–255, 344–89, 593–615, and *passim*; *see also* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 203–43 (1997).

corrupt forms of tyranny, oligarchy, or anarchy."[19] This was not a theory of separation of powers, but something more like a scientific model that postulated a congruence between the natural order of society and the ideal form of government. Just as nature dictated that society would comprise "monarchy, aristocracy, and people," so, too, would a well-constituted government embody monarchy in the Crown, nobility in a House of Lords, and the people in a House of Commons.[20]

Separation of powers theory—or, one might say with equal justice, separation of *functions* theory—evolved in the mid-seventeenth century as a way of critiquing, first, the Crown abuses leading to the regicide of 1649 and then, the abuses of the Long Parliament that led to restoration of the monarchy and the House of Lords.[21] Its premise was that the organs of government were distinguished not only by the estates they represented, but also by the tasks to which they were best suited.[22] John Locke's classic writings in the last third of the seventeenth century built on these political arguments, holding, in essence, that it ought to be the constitutional function of parliament to enact general laws and the constitutional function of the executive to attend to the work-a-day business of administration.[23] (In this view of things, judicial power was subsumed by the executive. Executing the law entailed enforcement of the judgments of the courts.[24]) But what is important to recall, especially because the colonists were enthusiasts of the British Constitution, is that their inherited wisdom did not originally defend the structure of constitutional government according to its congruence with a theory of governmental function. Rather, the colonists defended it according to its congruence with a particular theory of representation, in which the different estates of society were literally embodied in the whole of Parliament, including the King. The attribution to that structure of an appropriate separation of powers came later.

This picture of Parliament seems amazing to the twentieth century mind because it posits a notion of representation that partakes only in a small way of delegation, identity surrogacy, or, through the occasional mechanism of so-called "instructions," proxy voting. Commons mirrored the people in the sense that commoners constituted its membership, but there was nothing like "one person, one vote" to make Parliament truly the people's delegates. It mirrored the people partly in a geographic sense, but many electoral centers went virtually unrepresented, and

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[19] RAKOVE, *supra* note 18, at 245 (emphasis omitted).

[20] *See id.* at 245; WOOD, *supra* note 14, at 19.

[21] *See* RAKOVE, *supra* note 18, at 246.

[22] *See id.* at 245–46; WILLIAM B. GWYN, THE MEANING OF THE SEPARATION OF POWERS 26 (1965).

[23] *See* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT, §§ 142–44, 159 (T.P. Peardon ed., 1952); WOOD, *supra* note 14, at 25–26.

[24] *See* RAKOVE, *supra* note 18, at 247; WOOD, *supra* note 14, at 159, 454.

the Crown, directly or indirectly, controlled many a borough.[25] There was no attempt to include women or other then-subordinate classes of the social hierarchy in direct decisionmaking.[26] There was no particular mechanism to ensure that the membership of Commons would mirror the people's sentiments or their interests, taken as individuals.

But the people *were* represented, and they largely deemed themselves represented, because they accepted the fiduciary character of Parliament. This theory of representation, known then, as now, as "virtual representation," was especially understandable because of the then-accepted purpose of representation. That purpose was not the translation of popular sentiment into positive statutory enactments. Rather, the function of representation, its central importance to the English theory of liberty, was its guarantee that arbitrary Crown authority would be checked through a political body protective of what was understood to be the corporate interests of the people.[27] When the Glorious Revolution established the supremacy of Parliament, it did not signify a role for popular representatives to engage in deliberative lawmaking. Rather, in the words of Edmund Burke, the Commons was to provide "a vigilant and jealous eye over the executory and judicial magistracy; an anxious care of public money; an openness, approaching towards facility, to public complaint."[28] It was thus the fiduciary aspect of representation that loomed largest in common understanding of how Parliament consented to the exercise of power. Consent was established through the action of legislators drawn from the people, though hardly mirroring them, and acting with their best interests in mind.

When transported to North America, this model of government was replicated in colonial governments bearing a superficial resemblance to Crown, Lords, and Commons. The governor in each colony had prerogative powers, which he exercised under authority from the Crown.[29] In nearly every colony, a colonial council functioned as part upper legislative chamber and part advisory executive council.[30] And, in every colony, an elected assembly performed the parliamentary function of representing the people to the magistracy.[31]

But this triumvirate of institutions differed in at least three key ways from their counterparts in the mother country. First, although the upper councils were thought

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[25] *See* WOOD, *supra* note 14, at 170–71.

[26] *See* JAMES MORONE, THE DEMOCRATIC WISH: POPULAR PARTICIPATION AND THE LIMITS OF AMERICAN GOVERNMENT 41 (1990).

[27] *See id.* at 35; RAKOVE, *supra* note 18, at 209; REID, *supra* note 17, at 28.

[28] RAKOVE, *supra* note 18, at 209 (quoting Edmund Burke).

[29] *See* RAKOVE, *supra* note 18, at 249.

[30] *See* WOOD, *supra* note 14, at 159.

[31] *See* Reid, *supra* note 17, at 31.

more likely to include the natural social and intellectual elite of society, they did not represent a separate estate. There was no nobility. The councils thus did not have as their mission serving a corporate interest adverse to or even different from the interests of the people as a whole. Second, the colonial assemblies actually legislated more than did Parliament. As John Philip Reid has written, these assemblies settled by law many questions that Parliament, despite its own steady transformation into a legislating body, did not take up until the nineteenth century.[32] Third, the assemblies rested on a much broader franchise. Although, as in England, there was no "identity surrogacy" for women, for slaves, or for other subordinated classes, the assemblies were far more truly the people's delegates than was Parliament. The franchise in the colonies extended far beyond freeholders, and there was a far tighter bond than in England between constituent and representative.[33] In this social milieu, it is no wonder that the salutary distribution of functions among the branches of government came to be a more important rationale for balanced constitutionalism than the recreation of the social order. Tripartite government in America simply did not replicate estates in American society.

By the 1760s, the colonists' experience of self-government had undermined their acceptance of the assertion that they were virtually represented in Parliament, and thus could legitimately be taxed there. Their problem was not with the theory of virtual representation *per se*; they accepted that individual citizens could be represented by others. Rather, they rejected the notion that both colonists and those in the mother country retained a unity of interest.[34] Thus, the interests of a colonist could be represented by another colonist, but they could not be represented by a body of commoners who did not share those interests.

By the eve of the Revolution, however, the theory of virtual representation in America was under attack. The perceived English abuses of the 1760s and 1770s caused the colonists, increasingly through direct action, to seize authority from Crown officials. The efforts at independence to form new governments for the states followed years of experience in which "We, the People" seemed truly to rule themselves, through conventions, mass meetings, mobs, and citizen committees, as much as through representative assemblies.[35] The imperative of government design became the re-creation of the people themselves in their new governments. John Adams wrote in 1776 that a representative assembly "should be in miniature an exact portrait of the people at large. It should think, feel, reason and act like them."[36] In this formulation, the theories of delegation, identity surrogacy, and proxy voting

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[32] *See id.* at 30; RAKOVE, *supra* note 18, at 212–13.

[33] *See* REID, *supra* note 17, at 41; RAKOVE, *supra* note 18, at 212.

[34] *See* WOOD, *supra* note 14, at 176–78.

[35] *See id.* at 313–14, 319–28; MORONE, *supra* note 26, at 53–56.

[36] WOOD, *supra* note 14, at 165 (quoting John Adams).

merge. A broadly enfranchised people would choose their representatives, who would resemble them and would "act like them." Moreover, there was to be no dissonance between these new republican assemblies and the fiduciary conception of government. That is because the genuine interest of the people was actually a shared, homogeneous interest—a vision plausible chiefly because Americans viewed themselves as arrayed against a common enemy, and they still took the assertion of the interests of the people as against their rulers to be the essential representative task.[37] Because there was no nobility and, of course, no crown as a separate estate, the revolutionary governments either did away with their chief magistracies or made them utterly subservient to the legislative branch.[38]

What happened between 1776 and 1789 is an oft-told tale. Under the pressures of actually governing, the interests of the people turned out not to be homogeneous.[39] The delegate model of the Continental Congress, which required virtual consensus for meaningful action, proved frustrating.[40] At the state level, the evisceration of the so-called magisterial power had wreaked havoc with government administration and the faithful execution of the laws, especially tax laws.[41] In federalist ideology, it became as critical a function of government to protect the individual against the majority, as to protect the people as a collectivity from any executive magistracy.[42]

It is hard to exaggerate how differently the constitutional delegates meeting in Philadelphia thus confronted questions of representation as compared to the makers of state constitutions just a little over a decade earlier. In 1776, the cure for factionalism was to represent the whole people as directly as possible in a legislature that clearly dominated the other branches of government.[43] This was because the people shared a common public interest, which all felt and which, properly assembled, all would express.[44] By 1787, however, James Madison could write in his famous *Federalist No. 10* of "a faction," meaning a group of persons "who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the

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[37] *See id.* at 57–58; RAKOVE, *supra* note 18, at 213–14.

[38] *See* WOOD, *supra* note 14, at 135–50.

[39] *See* RAKOVE, *supra* note 18, at 216–18.

[40] *See* RICHARD B. MORRIS, THE FORGING OF THE UNION 1781–1789, at 80–110 (1987); JACK N. RAKOVE, THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETIVE HISTORY OF THE CONTINENTAL CONGRESS 337–42 (1979); WOOD, *supra* note 14, at 354–62.

[41] *See* MORONE, *supra* note 26, at 58, 61; RAKOVE, *supra* note 18, at 250; WOOD, *supra* note 14, at 324–26, 407.

[42] *See* WOOD, *supra* note 14, at 403–13, 430–38.

[43] *See id.* at 165; MORONE, *supra* note 26, at 55; RAKOVE, *supra* note 18, at 203.

[44] *See* WOOD, *supra* note 14, at 179.

community."[45] And, even more remarkably, such a group of citizens would constitute a faction "whether amounting to a majority or minority of the whole."[46] John Adams, too, had utterly abandoned his vision of the legislature as a microcosm of the people. By the 1780s, Adams had reverted to an American theory of the "balanced Constitution" even less democratic in its sympathies than Madison's.[47]

When the Philadelphia delegates set out to structure the new national government, to design its principal institutions, and to allocate its powers, it was the problem of representation that loomed largest before them. The problem of representation cast an enormous shadow precisely because no formulaic version of representation could plausibly solve the full panoply of practical political problems that beset the new nation. And yet, there was no doubt in anyone's mind that, if those problems were to be overcome, representation was the key. If we are now to interpret the separation of powers with anything like fidelity to the original vision, it must be with this point in mind. Underlying the design of institutions and the allocation of government powers was a central challenge—how to solve the conundrum of representing the people in a way that promised a sound, stable, faithful, and energetic government devoted to the public interest, properly understood.

III. FROM THE CONSTITUTIONAL PERIOD TO OUR OWN

It may seem that I have wandered far afield from my original concern—whether to favor a strongly presidentialist theory of constitutional design or a theory, instead, that embraces a robust view of checks and balances. The latter theory approves, for example, a strong role for Congress in shaping (but not performing) the execution of the laws, as well as a vigorous role for courts in constraining the executive according to statute, and constraining both elected branches to observe constitutional principle. But I want to draw for you a contrast. It is a contrast between the highly nuanced and eminently pragmatic view of representation that animated the Constitution versus the formalistic and reductionist view of governance that animates modern presidentialism.

The Philadelphia delegates recognized that they wanted a government characterized by a great many qualities that suggest, all in all, the need for an extraordinary and dynamic pursuit of balance. Theirs was, in Gordon Wood's phrase, a "kinetic theory of politics."[48] On one hand, a new national legislature was to embody, through the House of Representatives, "an immediate dependence on,

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[45] THE FEDERALIST NO. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961).

[46] *Id.*

[47] *See* WOOD, *supra* note 14, at 574–80.

[48] *Id.* at 605.

and an intimate sympathy with, the people."[49] On the other hand, the legislature was to temper the passions and inexperience to which popular assemblies might fall prey with a more stable perspective, institutionalized in the Senate, based on experience and expertise. In order that national needs might be addressed effectively, Congress was to enjoy broad discretion in the making of law, and the executive was to have the energy necessary for sound administration—the "true test of a good government," according to Hamilton.[50] At the same time, both elected branches would be accountable to an unelected judiciary, protected as to both tenure and salary and authorized "to guard the Constitution and the rights of individuals."[51] And perhaps most ambitiously, the Philadelphia delegates recognized the bewildering diversity of interests among the people, and eschewed any reliance on the fiction of homogeneous public sentiment. They configured the government's principal institutions to mirror different constituencies and to follow different modes and terms of election. All were calculated to insure that local, state, and national perspectives would be distinctly articulated and given due weight in a new government in which reason would ultimately predominate over passion.

The framers understood their new governmental design to be revolutionary in its approach to representation, but note the qualities of representation that predominated. These were, first, the quality of delegation—that the people had a hand, whether direct or indirect, in constituting every branch of government, legislative, executive, and judicial, and second, the fiduciary character of the government, the obligation of every portion to pursue the true welfare of all the people. In the words of James Wilson:

> The executive and judicial powers are now drawn from the same source, are now animated by the same principles, and are now directed to the same ends, with the legislative authority: they who execute, and they who administer the laws, are so much the servants, and therefore as much the friends of the people, as those who make [the laws].[52]

In this pervasively representative government, people could be assured the legitimacy of government action—but not, primarily, because of any necessary congruence between government action and immediate popular sentiment. What would serve the people would be the combined personal qualities of those they chose to govern them, and an institutional imperative resulting from the tangle of checks and balances—the imperative of deliberation. In the words of Hamilton:

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[49] THE FEDERALIST NO. 52, at 327 (James Madison) (Clinton Rossiter ed., 1961).

[50] THE FEDERALIST NO. 64, at 414 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[51] THE FEDERALIST NO. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[52] WOOD, *supra* note 14, at 598 (quoting James Wilson).

> The oftener [a] measure is brought under examination, the greater the diversity in the situations of those who are to examine it, the less must be the danger of those errors which flow from want of due deliberation, or of those missteps which proceed from the contagion of some common passion or interest. It is far less probable that culpable views of any kind should infect all the parts of the government at the same moment and in relation to the same object than that they should by turns govern and mislead every one of them.[53]

Now note, whether the ambitions of Madison, Hamilton, *et al.*, have been realized, how utterly pragmatic and functional was their approach. They were not concerned about the conceptual purity of classifying and distributing powers according to any Procrustean set of categories. If you asked a member of the founding generation whether the Senate was of a legislative or executive character, the likely answer would have been, "Both."[54] If you similarly asked to which elected branch the Secretary of the Treasury was accountable, you would probably have gotten the same answer.[55] If you asked whether the President needed to have plenary policy control over all subordinate administrators, you probably would have gotten, "No," or, from a thoughtful observer, "It depends," as your response.[56] Conceptualization followed function, not the other way around. Again to quote Professor Reid: "Americans arrived at their law of representation not by theory but by experiment."[57]

Compare this approach to representation to what Professor Calabresi, with greatest sophistication among the presidentialists, puts forth as the normative case for presidentialism. In his view, the President ought to be deemed to have plenary control over all aspects of administration because his national constituency equips him uniquely to resist factions, by which Professor Calabresi means "special interests."[58] How does the national character of the presidency do this?

It cannot be because the President is more likely to be a satisfactory identity—or interest—surrogate for the people than is Congress or the Judiciary. In that respect, his unitariness is an obvious disadvantage. He is no more our delegate than the other branches, nor is he likely to be an effective proxy for voting "our" preferences. We get to approve any particular President only twice—and vote him

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[53] THE FEDERALIST NO. 73, at 443 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[54] *See* JOHN A. ROHR, TO RUN A CONSTITUTION: THE LEGITIMACY OF THE ADMINISTRATIVE STATE 28–39 (1986).

[55] *See* Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211, 240–42 (1989).

[56] *See* Peter M. Shane, *Independent Policymaking and Presidential Power: A Constitutional Analysis*, 57 GEO. WASH. L. REV. 596, 613–17 (1989).

[57] REID, *supra* note 17, at 6.

[58] *See* Calabresi, *Normative Arguments*, *supra* note 6, at 58–70.

out of office only once. The range of issues on which he must take positions and the varying intensity with which those issues resonate with the multifarious subgroups of our population simply preclude the President from reliably representing majority sentiment. No—for the national character of the President to make him our most effective bulwark against faction, it must be because he is our most reliable fiduciary. But, why would this be?

On one hand, it may justly be claimed that the President may be most acclimated to thinking about problems from a national perspective, which distances him from local sympathies or allegiances that might distort his calculation of the public interest. But, as the framers would remind us, the predominance of any one perspective—national, state, or local—is by itself problematic in pursuit of the public welfare. The keys to that process are dialogue and deliberation—and it is far from clear that giving the President plenary policy control over all administration will ensure either—precisely because the President is least likely to be sensitive to state and local interests, even when, objectively speaking, they are most salient in calculating the public interest.

It might also be said, á la Hamilton, that the President is most likely to bring qualities of strong character to the tasks of governance.[59] Having to earn the esteem of so many, the President presumably must partake of a greater virtue than those who need impress only a single congressional district or even an entire state. In light of current events, I can't bring myself to belabor why this argument fails. Think—John Glenn/Bill Clinton, Morris Udall/Richard Nixon .... You get the point.

Finally, and I think this is Professor Calabresi's main argument, the President has the least incentive to give in to special interests and the greatest disincentive.[60] Here, I believe, the presidentialists truly are blinking reality. Because of the enormous costs of election and reelection, exacerbated by the President's role as chief party fund-raiser, the Chief Executive probably has the greatest interest among all national politicians in courting and pleasing special interests, by which I mean interests that would advance themselves through money and the exercise of raw power rather than reason. Here, the names Trie, Huang, and Riady may prove a

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[59] This process of election affords a moral certainty that the office of President will seldom fall to the lot of any man who is not in an eminent degree endowed with the requisite qualifications. Talents for low intrigue, and the little arts of popularity, may alone suffice to elevate a man to the first honors in a single State; but it will require other talents, and a different kind of merit, to establish him in the esteem and confidence of the whole Union, or of so considerable a portion of it as would be necessary to make him a successful candidate for the distinguished office of President of the United States. It will not be too strong to say, that there will be a constant probability of seeing the station filled by characters pre-eminent for ability and virtue.

THE FEDERALIST NO. 68, at 414 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[60] *See* Calabresi, *Normative Arguments*, *supra* note 6, at 67.

helpful mnemonic device.[61]

There is much more to be said here. It is clear from Professor Calabresi's account that his preference for presidential power rests in large part on a denigration of both Congress and the judiciary.[62] Intriguingly, the people do not share the latter view. Recent polls, for example, show that our federal judiciary is overwhelmingly the most trusted branch of the national government—trusted "a great deal" or "a fair amount" by over 70% of the population.[63] But one need not romanticize either Congress or court to see in the presidentialist view of separation of powers an implausibly utopian account of the executive.

This does not mean I disagree with all presidentialist proposals. The line-item veto, which Professor Calabresi advances as a weapon in the President's struggle against faction, is still a device worthy of experimentation for its potential contribution to presidential involvement in genuine dialogue with Congress over appropriations policy.[64] But my analysis does indicate that, examined most generally, presidentialism is not just doctrinally off-base; it is normatively misguided.

Our constitutional legacy is a tripartite national government that in different ways and through different mechanisms provides us with a co-equal trio of representative institutions. Whatever appreciation of our diversity led the framers to elevate deliberation among such institutions as the key to legitimate action, we can only redouble or even re-triple our recognition of that diversity today. Whatever concern for stability led them in an eighteenth century world to understand the risks

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[61] The allegations against these three individuals in connection with fund-raising for the 1996 Democratic presidential campaign are briefly summarized in James A. Barnes et al., *The Next Special Counsel?*, NAT'L J., Sept. 12, 1998, at 2090, 2093–94.

[62] *See* Calabresi, *Normative Arguments*, *supra* note 6, at 50–57.

[63] *See* Gallup Poll Survey, Dec. 28–Dec. 29, 1998, *available in* Westlaw, Poll Database, Oct. 8, 1998 (Descriptors: Confidence; Government; Courts). Respondents typically were queried as follows: "As you know, our federal government is made up of three branches: an executive branch, headed by the President, a judicial branch, headed by the U.S. (United States) Supreme Court, and a legislative branch, made up of the U.S. Senate and House of Representatives. Let me ask you how much trust and confidence you have at this time in . . . the judicial branch, headed by the U.S. Supreme Court? . . ." *Id.*

[64] Following *Clinton v. New York*, 524 U.S. 417 (1998), however, which invalidated the 1996 Line Item Veto Act, 2 U.S.C. § 691 *et seq.* (1994 & Supp. II), Congress would now have to reauthorize the line-item veto in a form that would not run afoul of the Supreme Court's formal understanding of the legislative process. A legislative proposal that would accomplish this objective would involve the automatic transformation of every appropriations measure into individual line-item bills that would have to be either approved or vetoed separately by the President. In suggesting the possible utility of this experiment in dialogue, I would add, however, that I think it unlikely to have significant impact on the overall fiscal performance of the national government. *See* Peter M. Shane, *Line-Item Veto's Political Web*, CHRISTIAN SCI. MONITOR, Apr. 19, 1996, at 20.

and the dangers posed by tyrannical majorities, we can only feel more intensely in a world where the potential tools of oppression are so much more numerous and more potent.

What is ironic, because I believe it is overlooked or denigrated in the presidentialist literature, is that the executive's strongest claim as an important check against faction is its capacity to develop expertise. This is itself a big topic, but, if I am right, then it is certainly even less clear that the President's comparative advantage in the struggle to constrain the impulses of faction demands the plenary policy control over administration that the presidentialists recommend. It may be that providing administrators some tenure protection to ensure robust dialogue within the executive branch would be a better idea.[65]

Modern presidentialism depends on a view of our political process that is, in my judgment, naively mechanical. It is unduly cynical about our political possibilities and unduly utopian in its hopes for the presidency. In deciding on the view of separation of powers we ought to embrace, we should never forget that our separation of powers is intended to foster the fiduciary, deliberative quality of our uniquely representative government. When we stop seeing the People's reflection equally in the executive, the legislature, and the judiciary, it can only be because we—or they—have forgotten or betrayed the multidimensional character of the constitutional ideal.

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[65] *See generally* William V. Luneburg, *Civic Republicanism, the First Amendment, and Executive Branch Policymaking*, 43 ADMIN. L. REV. 367 (1991).